

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. — **76-27**

JOSEPH NAPLES, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

This Petition results from orders entered on July 1, 1975 and July 31, 1975 by the United States District Court for the Northern District of Ohio (App. 1) revoking the probation which had theretofore been granted Petitioner by said Court. Said probation revocation was subsequently affirmed by the United States Court of Appeals for the Sixth Circuit in an opinion entered on May 14, 1976. (App. 2)

JURISDICTIONAL GROUNDS

Jurisdiction of this Court is involved pursuant to Section 1254 of Title 28 of the United States Code whereby Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the aforementioned order of the Court of Appeals for the Sixth Circuit which was entered on May 14, 1976.

This Court heretofore entered an order under the date of June 11, 1976 granting Petitioner an extension of time in which to file this Petition until July 13, 1976.

QUESTIONS PRESENTED

Where the revocation of a defendant's probation is sought to be predicated upon the asserted failure of said defendant to comply with a general condition of probation; namely the commission of perjury before a duly impaneled Special Federal Grand Jury; and where said purported failure involves the resolution of a factual dispute; to-wit, whether perjury was committed; what is the proper evidentiary standard to be applied by the Court in resolving said factual conflict and thereby ascertaining whether a violation of probation exists?

STATUTES INVOLVED

The statutes involved are as follows: 18 U.S.C. § 371; 18 U.S.C. § 1623; 18 U.S.C. § 1955; 18 U.S.C. § 3651; 18 U.S.C. § 4208 (a) (1). Rule 32 F.R. Crim. P.

These are set out verbatim in Appendix 3.

FACTUAL STATEMENT

On February 28, 1975 defendant-petitioner (hereinafter defendant) appeared in the United States District Court for the Northern District of Ohio and, along with seven co-defendants, pled guilty to Count I of an indictment charging a violation of 18 U.S.C. § 1955 and 2; namely, conducting an illegal gambling business involving five or more persons.

In exchange for the plea of guilty to Count I, Count II of the same indictment (conspiracy in violation of 18 U.S.C. § 371) was dismissed upon the Government's motion.

On the same date, defendant was sentenced to a term of five years imprisonment and ordered to pay a \$20,000.00 fine under the provisions of 18 U.S.C. § 4208 (a) (1). Except for \$10,000.00 of the fine; execution of the entire sentence was suspended and the defendant was placed on probation for five years under both general and special conditions.

On May 22, 1975 the defendant was charged with violating a general condition of his probation; to-wit, that during his probationary period he violated federal law by committing perjury before a duly impaneled special federal Grand Jury in violation of 18 U.S.C. § 1623.

Defendant's conviction, upon which his probation was predicated, arose from a gambling (numbers) operation which had, in part, been conducted during 1973 at a farmhouse located at 4041 McCartney Road, Coitsville Township, Ohio. When the F.B.I. searched this dwelling on July 12, 1973 they found, among other items, a Philco 5000 B.T.U. window air conditioner and relating thereto a sales invoice-receipt from a Youngstown, Ohio retail outlet known as Kelly and Cohen. This invoice was made

payable to cash and was signed by a salesman named Carsonie.

It was with reference to the purchase-ownership of this air conditioner that the asserted perjury before the Grand Jury transpired on April 22, 1975. Specifically, at that proceeding the following colloquy took place between the United States Attorney and defendant:

Q. (U.S. Attorney) "Who furnished the air conditioner?"

A. (Defendant) "I don't know. I couldn't tell you."

Q. "You are certain of that?"

A. "I would think Mr. Holovatick bought it, but I don't know for sure. I think one day he went to get a cord for it."

Q. "Get a cord?"

A. "An extension cord, so I assume he purchased it, either he or Mr. Bajnok."

Q. "But you didn't purchase it?"

A. "No."

Q. "You are certain of that?"

A. "Yes."

* * *

Q. "You didn't furnish the air conditioner?"

A. "No sir."

Although the Government had the sales invoice-receipt in its possession at the time of the above exchange, it was not shown to the defendant so as to refresh his recollection or otherwise put the entire transaction in its proper perspective.

Instead the Government, asserting the defendant in fact purchased-furnished the air conditioner, moves, via the Court's Probation Department, to revoke his probation.

An evidentiary hearing pursuant to Rule 32(f) F.R. Crim. P. was thereafter commenced on May 23, 1975.

Further hearings were conducted on June 23, 1975 and July 30, 1975.

At these hearings it was established and conceded that the air conditioner found by the F.B.I. at the McCartney Road farmhouse on July 12, 1973 was purchased on June 12, 1973 at the Kelly and Cohen store in Youngstown, Ohio and that the sales invoice-receipt also found at the farmhouse related to this particular purchase. It was further established that the defendant and an individual named Paul Holovatick entered Kelly and Cohen on June 12, 1973 and pursuant to their visit the air conditioner in question was purchased.

The hearings therefore centered upon the question of whether the Government established by the proper evidentiary standard that the defendant was the purchaser of the air conditioner so as to make out a violation of 18 U.S.C. § 1623.

For the purpose of the within Petition it is not necessary to review in detail the testimony presented at these hearings. It is sufficient to state that there was a conflict in the evidence and a question as to whether the Government had sustained its burden of proof.

The Government's case was presented almost exclusively through the Kelly and Cohen salesclerk, Ralph Carsonie. The defendant's case rested upon the testimony of the defendant and Paul Holovatick.

In short, on direct examination witness Carsonie testified that the defendant was the purchaser and that it was the defendant who handed him the cash which consummated the transaction.

On cross examination, however, this witness could not say whether it was the defendant or Paul Holovatick who

was the purchaser. He could not remember which individual handed him the purchase price. He did remember handing the sales invoice to Paul Holovatick and he verified that it was company policy always to hand the sales slip to the customer.

The defendant's and Holovatick's testimony was simply that Holovatick was the purchaser.

On the basis of the evidentiary hearings, the Court, apparently applying the manifest weight of the evidence test to resolve factual disputes, found the defendant to be the purchaser of the air conditioner. It was thus held that the defendant committed perjury before the Grand Jury and that his probation should be terminated accordingly.

ARGUMENT

In accordance with Rule 19 of this Honorable Court it is respectfully submitted that a Writ of Certiorari should issue on the basis of the fact that there exists a conflict among the Court of Appeals as to the proper evidentiary standard to be applied in resolving factual disputes in revocation of probation proceedings.

While at one point in the history of American jurisprudence it was felt that probation was an "act of grace" and thus revocation thereof was not within the ambit of the Fourteenth Amendment, see *Escoe v. Zerbst*, 294 U.S. 490, 492 (1935), it is now clear that the revocation of probation as well as parole is subject to the requirements of due process. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). See also, *Mempa v. Ray*, 389 U.S. 128 (1967); Rule 32(f) of the Federal Rules of Criminal Procedure.

This is so even though technically revocation is not a part of the criminal prosecution because undoubtedly it may and does not result in the loss of liberty. *Gagnon*, supra; *Morrissey*, supra.

As a result, among other requirements, due process mandates that at least the petitioner-defendant be presented with written notice of the claimed violations and be accorded a hearing upon said charges. *Morrissey*, supra. In addition, it is submitted that due process requires that the alleged violations be proven by an acceptable evidentiary standard. This is especially true where, as in the present action, the facts are in dispute with reference to whether the petitioner-defendant again violated the law contrary to the terms of his probation. This is to insure the integrity of the revocation proceeding as a truth-seeking inquiry. See *ABA Project on Standards For Criminal Justice — Standards Relating To Probation*, Section 514 at page 65, 1970 Ed.

Courts of Appeals however have differed as to the proper evidentiary standard to be applied. Some have merely adopted an abuse of discretion standard. See, for example, *U.S. v. Shapiro*, 491 F.2d 335, 336 (6th Cir. 1974); *U.S. v. Ambrose*, 483 F.2d 742, 754 (6th Cir. 1973); *U.S. v. Farmer*, 512 F.2d 160, 163 (6th Cir. 1975).

Other courts have applied the manifest weight of the evidence test as the lower court did in the present action. See, for example, *U.S. v. Francischine*, 512 F.2d 827 (5th Cir. 1975). Still other lower federal courts have applied the preponderance of the evidence test. See, for example, *U.S. v. Sample*, 378 F.Supp. 44 (D.C. Pa. 1974); *U.S. v. Strada*, 393 F.Supp. 19 (W.D. Missouri, 1974). See also, *ABA Standards*, supra.

It is therefore respectfully submitted that due to the above outlined conflict that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the question presented herein.

Respectfully submitted,

.....
CARMEN A. POLICY

411 Legal Arts Centre
Youngstown, Ohio 44503

APPENDIX 1

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. CR 74-66 Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH NAPLES, JR.,

Defendant,

ORDER

(Filed June 30, 1975)

LAMBROS, DISTRICT JUDGE

On February 28, 1975, the Court accepted the above-named defendant's plea of guilty to charges of conducting, managing, supervising, and directing an illegal gambling operation in violation of 18 U.S.C. §§ 1955 and 2. The defendant was sentenced to five years in the custody of the Attorney General under the provisions of 18 U.S.C. § 4208 (a) (1). Execution of the sentence was suspended, as was payment of all but \$10,000 of the fine, and the defendant was placed on probation for a period of five

years under special terms and conditions of probation set forth orally on February 28, 1975 and issued in writing on March 6, 1975.

On May 23 and June 23, 1975, hearings were held to determine whether or not the defendant had violated the terms and conditions of his probation. Upon a review of all the exhibits introduced and after evaluation of the testimony, the Court finds that the manifest weight of the evidence¹ establishes that the defendant did violate the special terms and conditions of probation imposed upon him, to wit:

On April 22, 1975, the defendant testified before a properly empaneled Special Federal Grand Jury which was inquiring into possible violations of 18 U.S.C. § 1955, the federal gambling law. It was material to the course of that investigation that the Grand Jury discovery who controlled, managed and supervised the numbers gambling business located at 4041 McCartney Road, Coitsville Township, Ohio. The role of Mr. Naples and the extent of his knowledge of those operations was of importance and under the terms of his probation, he was obliged to cooperate fully and completely with the Government in furnishing the names and addresses of those persons actively involved in the gambling operation. If the Grand Jury believed that the defendant was only a "consultant" with little actual knowledge of the operation, they would be forced to seek the information they needed from less cooperative sources. On the other hand, if the involvement of the defendant was more substantial, then an investigation into his knowledge could be expected to produce valuable information.

To this end, the United States Attorney conducting the Grand Jury investigation asked a series of questions con-

cerning the purchase of an air conditioner found at the numbers operation headquarters on McCartney Road. The defendant denied any knowledge of the air conditioner or who purchased it. Despite repeated attempts by the United States Attorney on this point, he continued to deny having any knowledge, other than to indicate that either Mr. Holovatick or Mr. Bajnok, two codefendants, might have purchased it.

At probation revocation hearings noted previously, the Government introduced evidence and testimony establishing that on June 12, 1973, the defendant and Paul Holovatick purchased an air conditioner at Kelly and Cohen, a Youngstown appliance store. The evidence and the inferences properly drawn therefrom further established that the sales receipt for this air conditioner was found at the McCartney Road location during a proper search on July 12, 1973 and that the air conditioner found installed at the same location was in fact the air conditioner purchased on June 12, 1973 by the defendant and Holovatick.

The testimony of Ralph Carsonie, the salesman who sold the air conditioner to the defendant and Holovatick, was somewhat inconsistent on the issue of who actually made the purchase. At first he was certain the defendant made the purchase but he eventually felt he could not identify which man was the buyer. It is clear, though, that both men contributed some money toward the purchase and that a special request was made that the receipt be made to "cash" rather than being filled out so as to reflect the purchaser's name and address.

The Court is satisfied that the defendant purchased the air conditioner and deliberately deceived the Grand Jury in this regard. But even assuming that Holovatick purchased the air conditioner, the defendant was obligated to

¹ U.S. v. *Francischine*, 512 F.2d 827 (5th Cir. 1975).

cooperate with the Government in its investigation. He had been granted probation on special conditions which were made clear to him. Viewed from either perspective, the evidence clearly establishes a willful failure to cooperate which constitutes a failure to comply with the special terms and conditions of probation imposed upon him. This conduct furnishes a proper basis for the termination of probation. *United States v. Landy*, 513 F.2d 306 (5th Cir. 1975); *Francischine*, *supra*.

Accordingly, the Court does terminate the defendant's probation and orders into effect the sentence previously imposed. The Court further orders that the defendant serve not less than one-third of that five year sentence.

The defendant's oral request for release on bail pending appeal is denied. Execution of this sentence is deferred until July 3, 1975, at 10:00 a.m., at which time the defendant shall report to the United States Marshal in the United States Courthouse in Youngstown, Ohio.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge

DATED: 6/30/75

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. CR 74-66 Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH NAPLES, JR.,

Defendant.

ORDER

(Filed July 31, 1975)

LAMBROS, DISTRICT JUDGE

On July 1, 1975, the Court entered an Order finding that based upon the evidence presented to it at two separate hearings, the defendant had violated the terms and conditions of his probation. The Court terminated probation and ordered into effect the sentence previously imposed.

The defendant subsequently moved to reopen the proceedings to present the testimony of Paul Holovatick, a witness whose testimony would exonerate the defendant, it was asserted. To afford adequate opportunity to review the motion, the Court deferred execution of the sentence.

On July 30, 1975, the Court determined that the defendant should be allowed to present Holovatick's testimony

and the Court reopened the proceedings. The testimony of Mr. Holovatick was received on that date and subjected to a somewhat limited cross-examination.

Upon consideraion of all the evidence presented, the Court reaffirms its July 1, 1975 order and adopts it herein. The testimony of Mr. Holovatick was not sufficiently credible to cause the Court to alter its finding that the defendant violated the terms and conditions of probation by failing to testify fully and accurately before a duly convened Grand Jury.

The sentence of five years imprisonment and the fine of \$20,000 previously imposed is ordered into effect, the defendant's probation being terminated.

The defendant may remain at liberty on the bail previously posted for a period of 10 days from this date, or, if an appeal is taken within that period, until the conclusion of the appellate process. 18 U.S.C. §§ 3146 and 3148. The conditions of release are that the defendant shall report to the United States Probation Department in Youngstown, Ohio and that he comply with the regular and special conditions of probation imposed March 6, 1975, save and excepting that he shall be able to maintain a social relationship with Paul Holovatick. The defendant is advised that should he fail to comply with any of the above conditions, he would be subject to the penalties provided under 18 U.S.C. § 3150.

IT IS SO ORDERED.

/s/ THOMAS D. LAMBROS
United States District Judge

DATED: 7/31/75

APPENDIX 2

No. 75-2422

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH NAPLES, JR.,
Defendant-Appellant.

ORDER

(Filed May 14, 1976)

**BEFORE: EDWARDS and McCREE, Circuit Judges,
and RUBIN,* District Judge.**

Defendant's appeal from an order terminating probation and giving effect to a sentence of five years imprisonment and a fine of \$20,000 having come on to be heard, and appellant having asserted there was insufficient evidence of a violation of the terms and conditions of probation and that the district court abused its discretion in revoking probation, upon consideration of the briefs, record and oral argument, it is determined that appellant

* The Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

received a due process hearing, that the finding that a term of probation was violated is amply supported by the evidence, and that the district court did not abuse its discretion in revoking probation. Accordingly, the judgment of the district court is hereby **AFFIRMED**.

Entered by order of the court

John P. Hehman, Clerk

/s/ GRACE KELLER
Chief Deputy

APPENDIX 3

18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both. 18 U.S.C. § 371

18 U.S.C. § 1623

§ 1623. False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. 18 U.S.C. § 1623

* * *

18 U.S.C. § 1955

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business

shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day. 18 U.S.C. § 1955

* * *

18 U.S.C. § 3651

§ 3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

* * *

The court may revoke or modify any condition of probation, or may change the period of probation. 18 U.S.C. § 3651

* * *

18 U.S.C. § 4208

§ 4208. Fixing eligibility for parole at time of sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine. 18 U.S.C. § 4208

* * *

FEDERAL RULES CRIMINAL PROCEDURE

CHAPTER 8

JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

* * *

(f) **Revocation of probation.** The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing. As amended April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3 (31) - (34), 89 Stat. 375. Rule 32 Federal Rules Criminal Procedure.

Supreme Court, U. S.
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SEP 22 1976

MICHAEL RODAK, JR., CLERK

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JOSEPH NAPLES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-27

JOSEPH NAPLES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there is a conflict among the circuits concerning the evidentiary standards properly used in determining whether an individual has violated the conditions of his probation and that this Court should grant the petition in order to resolve that conflict.

On February 28, 1975, petitioner pleaded guilty in the United States District Court for the Northern District of Ohio to having conducted an illegal gambling business, in violation of 18 U.S.C. 1955 and 2. He was sentenced to five years' imprisonment and fined \$20,000; execution of the sentence, except for \$10,000 of the fine, was suspended in favor of five years' probation. Two months later, petitioner's probation officer petitioned the district court to revoke petitioner's probation on the ground that he had committed perjury before a federal grand jury, in violation of 18 U.S.C. 1623. After having held three evi-

dentiary hearings, the district court revoked petitioner's probation (Pet. App. 1a-6a). The court of appeals affirmed (Pet. App. 7a-8a).

Petitioner does not contend that the district court used an improper evidentiary standard in determining whether he had violated conditions of his probation; rather, he contends that there is a conflict among the circuits concerning the standard properly used in such circumstances and that this Court should grant the petition in order to resolve that conflict. However, petitioner cites no conflicting appellate decisions on the subject, and we know of none.

The district court revoked petitioner's probation after having found that the "manifest weight of the evidence" showed that he had violated certain of the conditions of his probation (Pet. App. 2a; citing *United States v. Francischine*, 512 F. 2d 827 (C.A. 5)). While some district courts have chosen to articulate this standard somewhat differently, speaking in terms of a "preponderance of the evidence" (e.g., *United States v. Strada*, 393 F. Supp. 19, 21 (W.D. Mo.)), there is no reason to believe that such slight variation in the formulation of the standard is of any significance. Moreover, petitioner cannot reasonably suggest that his probation might not have been revoked had the government been required to satisfy a "preponderance of the evidence" rather than a "manifest weight of the evidence" standard.¹

¹In affirming the district court's decision, the court of appeals concluded that "the finding that a term of probation was violated is amply supported by the evidence, and that the district court did not abuse its discretion in revoking probation" (Pet. App. 8a). We know of no case holding that the court of appeals should have employed some other standard on review, and petitioner does not refer to any.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.